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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

No. 714

GERALD F. UPDIKE, MRS. GRACE PEARL UPDIKE, LEON W. UPDIKE, AND JAMES M. UPDIKE, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF UPDIKE AWNING COMPANY,

Petitioners,

vs.

IVAN M. WEST, J. C. DUNLAP, P. N. NACHEFF, NATIONAL BANK OF TULSA, AND MASSACHUSETTS BONDING AND INSURANCE COMPANY, OF BOSTON, MASSACHUSETTS,

Respondents.

REPLY BRIEF.

Here, as in the courts below, respondents evade the issues of fact and law which warrant certiorari. Six specifications of error are set forth in the petition for certiorari at page 9 and adopted in the brief of petitioners at page 13

First petitioners assert:

1. That a petition for removal which denies unequivocally that any local citizen has been joined as a defendant does not plead facts to show federal jurisdiction for fraudulent joinder.

From the briefs it seems conceded that where the requi-

site amount is in controversy and there is a diversity of citizenship as to other parties, notwithstanding the presence of a resident defendant, a suit may be removed:

> "* * * if it is shown that the resident defendant was made a party for the fraudulent purpose of defeating removal."

And that:

> "Fraudulent joinder * * * like any other allegation of fraud must be pleaded with sufficient certainty to justify the conclusion that the joinder was a fraudulent device to prevent removal * * *."

Also that:

> "The misjoinder of parties or causes of action does not, without more, amount to a fraudulent joinder ***."

The petition for removal expressly avers:

> "* * * that these petitioners Ivan M. West, J. C. Dunlap and P. N. Nacheff, and each of them, were at the commencement of said suit and have been at all times since and are now residents of Wichita, Sedgwick County, Kansas. That the defendant, The National Bank of Tulsa, is a banking corporation or association organized under the laws of the United States of America. (R. 12) * * *
>
> "* * * that the state court where said case is now pending obviously has no jurisdiction over the defendant, National Bank of Tulsa, under the provisions of the applicable Statute of the United States of America providing for jurisdiction over a national banking association * * *." (R. 13)

Despite these unqualified assertions in the petition for removal, respondents' counsel assert (their brief, p. 11):

> "The removal petition did not claim * * * that the defendant National Bank of Tulsa was not a local resident of the State of Oklahoma."

This contention is answered by reference to the record and requires no further comment.

There is no allegation in the removal petition that any local resident has been joined at all. Absent such an allegation it is clear that the petition for removal does not plead the fraudulent joinder of a local resident for any purpose, much less for a fraudulent purpose.

The finding complained of involves the claimed fraudulent joinder of West, Nacheff and Dunlap. Neither the trial court nor the Circuit Court considered that there was alleged a fraudulent joinder of the bank. Counsel make no effort to answer the contention that if, as their removal petition avers, West, Nacheff and Dunlap are all non-residents, the petition shows no joinder of a resident defendant for any purpose, hence no fraudulent joinder.

If removing defendants are required to plead facts to show fraudulent joinder, they must first show which defendant is a local resident, then in what manner the joinder of that defendant is claimed to be fraudulent. For ought anyone could determine from the petition for removal, the evidence might have shown West rather than Nacheff to be a resident of Oklahoma. To sustain a plea of fraudulent joinder solely by reference to the petition for removal, the court is required to determine by divination or guess which removing defendant is a local resident, and also by the same process the manner in which the joinder of that particular defendant was fraudulent.

The only factual averment tending to show fraudulent joinder of West, Nacheff and Dunlap is:

> "* * * the fact that plaintiffs did not attach copies of the said separate contracts to their petition filed herein, or otherwise refer to said written contracts

which upon their face show there is no joint cause of action." (R. 14)

These contracts in no sense show fraudulent joinder. By the first contract (R. 15), the partners employed West, and by the second (R. 23) West, acting for the partners, employed Nacheff and Dunlap. The contracts were executed the same day, extended for the same period and covered the same general subject-matter. They did not show a separable controversy, much less a fraudulent joinder of a local resident.

Respondents' counsel, quibbling and straining technicalities, in their brief at page 4, assert unequivocally that there was no trial of the case. What they are attempting to say is that the petitioners confined the issue at the trial to the question of jurisdiction. (R. 249-251)

Again respecting petitioners' lawsuit they assert that:

"* * * it was never treated as a joint cause of action by anybody but the petitioners."

This contention is answered by observing that in the Federal court an amended petition was filed (R. 36) pleading a joint cause of action against all the managers and annexing the two contracts to which the managers alluded in their petition for removal. The managers West, Dunlap and Nacheff, joined in a motion to strike, to dismiss, and for a more specific statement (R. 54). This motion raised a great number of objections to the amended petition, but nowhere an objection that there was a misjoinder of causes of action, much less a fraudulent joinder of a local defendant against whom the petitioners did not in good faith assert a cause of action.

By answer and cross-petition the defendants Nacheff and Dunlap (R. 64ff) and West (R. 80ff) plead extensively

and in detail to the merits, but no where did they suggest either a misjoinder of causes of action or that plaintiffs were not in good faith prosecuting a joint cause of action.

The foregoing pleadings were before the court when the question of fraudulent joinder was under consideration by it, and at the trial. In *Hunter* v. *Ill. Central Ry. Co.*, 188 Fed. 645, cited by respondents in their brief at pages 5 and 6, it is stated:

> "Had it appeared on the trial of the case upon the merits that there was no separable controversy as to the removing defendants, it would have been the duty of the court to remand the cause * * *."

The issue of Federal jurisdiction was the first and primary one which the court should have considered and determined at the trial, but expressly refused to consider. Had this issue been considered on the record alone he would have been compelled to find that the joinder of West, Nacheff and Dunlap was not fraudulent; for the parties themselves had by failing so much as to raise such an issue conceded that their joinder was not only in good faith but proper as a matter of law.

2. Under the rules of civil procedure and the federal law a motion to remand is amendable, particularly where absence of federal jurisdiction is doubtful or apparent on the face of the record.

Respondents apparently concede this proposition but lay a predicate for irrelevant argument by wrongly charging that the petitioners "would have the rule construed to mean that the court can exercise no discretion in putting any kind of limit upon the extent and number of amendments * * *." Petitioners make no such contention. Leave to amend was applied for immediately upon the first sug-

gestion that there was any technical inaccuracy in the motion to remand (R. 239). The court then had under consideration an alias motion to remand, filed by leave of court. Both the trial court and the managers had proceeded to that point in offering evidence upon the assumption that fraudulent joinder was properly at issue under the pleadings. The court had stated specifically:

> "Of course, it is proper to hear evidence on an allegation of fraudulent joinder * * *," (R. 227)

and had admitted evidence to that issue.

Respondents distort the record when they assert that in the court's statement (R. 244):

> "Under ordinary circumstances I think I would permit leave to amend, particularly if the motion had been timely filed before a motion to remand was filed in this case,"

the word "filed" should be "overruled." The court could not have meant *overruled* for at the very time he had under consideration *the alias motion to remand, filed by leave of court.*

Petitioners do not contend that the rules permit amendments *ad infinitum* but do contend that alleged technical defects in motion to remand are amendable on timely application. The denial of the right to amend was absolute and unqualified.

3. Federal jurisdiction is not "largely a technical proposition anyhow" and since a decision on this question did not dispose of the matter on the merits the error, if any, could not be compensated by referring the case to another judge for trial.

The respondents make no effort to answer the soundness of this contention so it is taken as conceded.

4. Because of "developments" in the federal court in a removed case, doubt should not be resolved in favor of rather than against federal jurisdiction.

Respondents concede that "the question of jurisdiction in the courts of the United States, those of first instance and those of appeal, is first and fundamental * * * whenever it appears * * * that jurisdiction was lacking, it was the duty of the court to inquire into it, regardless of the attitude of the parties." (Their brief, pages 6 and 7.) This rule the trial court failed to observe.

5. Where by false assertions respecting their residence parties defendant induce the federal court to exercise unauthorized jurisdiction on the ground of diversity of citizenship, lawful jurisdiction on some other ground may not stem from such wrongful exercise of it.

Respondents attempt to argue that Federal jurisdiction attached because they succeeded by false statements respecting the citizenship and residence of Nacheff in removing the case to the Federal court and obtaining the exercise by the Federal court of jurisdiction in a case for an extended period; "It is now four years* that this case has been pending," they say (their brief, page 13), and they extensively detail proceedings had in the Federal court and elsewhere, even (knowing the case has never been tried) offer testimony and argue the facts.

"Without meaning to be facetious," they further declare, "petitioners must have had in mind the 'accepted and usual course of judicial proceedings' of their local Creek

(*In McAllester v. Chesapeake & Ohio R. R. Co., 243 U. S. 302, 61 L. ed. 735, 37 S. Ct. 274 (opinion by Mr. Justice CLARK), motion to remand a case wrongfully removed for alleged fraudulent joinder, had been filed July 21, 1902. The case was ordered remanded by this Court March 6, 1917, fifteen years after. Justice CLARK especially noted the long delay, but it seemed not seriously considered that federal jurisdiction might have been acquired by prescription.)

County court, where they had planned to keep Mr. West of Kansas to their advantage and his disadvantage." These contentions seem fully answered by observing that the question of Federal jurisdiction is not one of convenience or relative advantages to the one party or the other, but a question of law.

The jurisdiction of the inferior courts of the United States depend wholly on the Acts of Congress. It cannot be conferred by consent of the parties, or by their omission to contest it, or by estoppel. *C. B. & Q. Ry.* v. *Willard,* 220 U. S. 413, 31 S. Ct. 460, 55 L. ed. 521, and cases therein cited. Even had the partners waived the question of Federal jurisdiction they could have no assurance that the managers themselves might not raise the question even in this Court. See *Mansfield C. & L. M. R. Co.* 111 U. S. 379, 28 L. ed. 463, 4 S. Ct. 510.

The obvious remedy for respondents, if they fear they cannot have a fair trial in the local Creek County court, is to obtain a change of venue to another county, which they may do under the Oklahoma statute (12 O. S. A. 140). Petitioners are not meticulous about which court tries the merits of their lawsuit so long as its judgment when rendered may not be assailed for obvious jurisdictional defects.

6. A federal judge may not impose arbitrary limits as to the time or manner under which absence of federal jurisdiction apparent on the face of the record may be asserted prior to judgment.

That this proposition of law is sound seems conceded. A reference to the proceedings in the trial court shows that evidence was offered and received on the theory that the plea of fraudulent joinder was properly at issue under the pleadings (R. 226-229). When from the evidence, as well as

the pleadings in the Federal court as amended, it became clear that the joinder of all defendants was not fraudulent but in good faith, the trial judge of his own volition and without even a suggestion from respondents' counsel that such was the case, picked a technical flaw in the motion to remand and in advance of either arguments or briefs on the question denied petitioners an opportunity either to correct the motion to remand or otherwise bring the question of absence of jurisdiction to the attention of the court even at the date of the trial. (R. 238-249)

Conclusion.

It is clear that the petitioners have exhausted all other remedies to avoid the wrongful usurpation and exercise of jurisdiction by inferior Federal courts without avail, it is again earnestly submitted that the writ of certiorari should issue as prayed.

Respectfully submitted,

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

May 5, 1949.